No. 03-6696

In The
Supreme Court of the United States

YASER ESAM HAMDI; ESAM FOUAD HAMDI,
as Next Friend of YASER ESAM HAMDI,

Petitioners,

v.

DONALD H. RUMSFELD,
W.R. PAULETTE, Commander,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF INTERNATIONAL HUMANITARIAN ORGANIZATIONS AND ASSOCIATIONS OF INTERNATIONAL JOURNALISTS AS *AMICI CURIAE** SUPPORTING PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are non-profit humanitarian relief organizations and associations of international journalists whose staff and members are regularly called upon to work in zones of active military combat. At times, relief workers and journalists are mistakenly detained by armed forces operating in combat zones. The Fourth Circuit's ruling that persons detained as "enemy combatants" by United States armed forces in zones of active military combat have no right to a status determination by a competent tribunal under the Geneva Convention and no right under domestic law to meaningful judicial review of the factual basis for their detention poses grave concerns to *amici*. *Amici* take no position on whether petitioner Hamdi has committed acts that warrant treatment as an enemy combatant, nor whether Petitioner is actually a prisoner of war.

AmeriCares is a non-profit disaster relief and humanitarian aid organization that provides immediate response to emergency medical needs and supports long-term humanitarian assistance programs for all people around the world.

CARE USA is a non-profit international humanitarian organization committed to helping families in poor communities improve their lives and achieve lasting victories over poverty.

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

The International Rescue Committee is a non-profit, non-sectarian, voluntary agency providing assistance to refugees, displaced persons and others fleeing persecution and violent conflict.

Committee to Protect Journalists is a non-profit organization that promotes press freedom worldwide by defending the right of journalists to report the news without fear of reprisal.

Reporters Without Borders is a non-profit organization dedicated to defending the freedom of the press and journalists' safety and rights.

INTRODUCTION

In sustaining the President's assertion of unilateral power to designate anyone detained by the U.S. military in a zone of active military combat an "enemy combatant," the Fourth Circuit panel below acknowledged that "[t]he murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake." *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003) (*Hamdi III*). Nevertheless, the panel accepted Respondents' sweeping assertion that the Judicial Branch should play no role in uncovering and correcting mistakes made by the Executive in its enemy combatant designations. As Judges Luttig and Motz admonished in their dissents from the denial of rehearing *en banc*, the panel's regime of unfettered executive discretion poses serious consequences for the large numbers of international humanitarian relief workers and journalists lawfully operating in areas of armed military conflict worldwide.

As Judge Luttig astutely observed, it is far from idle speculation that a journalist or other innocent third party could be mistakenly seized and detained in a foreign combat zone. As he suggested, these risks are all too plausible given that the theater of the United States' current war on terror "is global, not circumscribed, and the engagement is an unconventional war against terrorists, not a conventional war against an identifiable nation state." *Hamdi v. Rumsfeld*, 337 F.3d 335, 358 (4th Cir. 2003) (*en banc*) (*Hamdi IV*). Echoing that concern, Judge Motz noted the "chilling" ramifications of the ruling below: "any of the 'embedded' American journalists covering the war in Iraq or any member of a humanitarian organization working in Afghanistan, could be imprisoned indefinitely without being charged with a crime or provided access to counsel if the Executive designated that person an 'enemy combatant.'" *Id.* at 372 (footnote omitted).

Responding to Judges Luttig and Motz, one of the authors of the Fourth Circuit panel opinion, Judge Traxler, wrote in his opinion concurring in the denial of rehearing *en banc* that the panel opinion was grounded in a presumption that *anyone*, "regardless of nationality," who is present in an enemy combat zone during war is a belligerent and an enemy of the United States. *Id.* at 351. Under this view, journalists and relief workers who are mistakenly detained as enemy combatants are simply reaping what they have sown by choosing to be present in a zone of combat. *See id.* at 352 ("American journalists and American tourists who venture into a country with whom we are at war without the approval of our military, or who fail to return to this country in time of war, necessarily expose themselves to many risks, including this one.").

This view is short-sighted at best, and fails to acknowledge the profoundly important work that is performed each day by international aid workers and journalists around the world and especially in zones of military combat. The Fourth Circuit panel's decision, which presented a false dichotomy between an all or nothing judicial process, severely compromises the ability of journalists and relief organizations to carry out their missions. *Amici* urge this Court to reverse that decision.

ARGUMENT

Though perhaps appropriate to the era in which it was formulated, the presumption of belligerence that animated the Fourth Circuit's decision has markedly less force with respect to conflict in our age. Humanitarian relief workers and international journalists are very much a part of this new world of porous borders and ill-defined battlefields. Large numbers of them are active in unstable areas of the world, including areas of recent U.S. military activity. They are present in combat zones not by choice, but by necessity, carrying out their vital work, and hardly fit the presumption of belligerence underpinning the Fourth Circuit's decision. As shown by recent examples, their active presence in combat zones puts them at risk of being mistakenly detained by the military. The Fourth Circuit's decision would deprive relief workers and journalists of any judicial process to protect them from indefinite detention, even in cases where that detention is the product of erroneous assumptions, mistaken perceptions, sheer arbitrariness, or other motivations.

I. Humanitarian Relief Organizations And Journalists Serve Vitally Important Roles In Areas of Conflict

A. Relief Workers And Journalists Are Active In Conflict-Ridden Areas

Humanitarian relief organizations provide critical services to people in need all around the globe – from disaster relief to refugee assistance to health and education programs. These services are particularly important in areas beset by armed conflict, man-made disasters that call for a humanitarian response. Sadly, armed conflict continues to riddle the world. As this brief is being filed, U.S. troops are daily engaged in high-risk operations in Iraq and Afghanistan. In addition, Colombia, Nepal, Burundi, the Central African Republic, Cote d'Ivoire, the Democratic Republic of the Congo, Sudan, and Uganda are all recognized areas of armed conflict today.[2] Additional nations suffer from acts of terrorism, including Kuwait, Yemen, Indonesia, Kenya, and Pakistan.[3] These conflicts have created an enormous population of refugees and internally-displaced persons. There are over 10 million refugees world-wide and as many as 25 million internally-displaced persons, with

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[2] Executive Committee of the High Commissioner's Programme, Safety and Security, EC/53/SC/CRP.5 (Standing Committee, 26th meeting February 10, 2003), *available at* http://www.unhcr.ch/cgi-bin/texis/vtx/home/+mwwBm9Ye06mwwwwnwwwwwwwhFqh0kgZTtFqnnLnqAFqh0kgZTcFqB5whnBOawDma5nq1GoBODzmxwwwwwww1FqmRbZ/opendoc.pdf (accessed February 20, 2004).

[3] *Id.*

major concentrations in central and western Africa, the Balkans, Colombia, Sri Lanka, and former Soviet states.[4]

Seeking to alleviate the misery and suffering that are inevitable by-products of armed conflict, InterAction, the largest alliance of U.S-based international development and humanitarian non-governmental organizations, has 160 member organizations operating in every developing country in the world.[5] InterAction members are particularly active in nations beset by warfare, including areas where U.S. forces have been deployed.[6] In 2002, twenty-nine InterAction member organizations reported active or planned relief and development operations in Afghanistan and Pakistan.[7] Eighteen had active or planned operations in Iraq, with forty-one organizations operating in the

[4] United Nations High Commissioner for Refugees, Refugees by Numbers 2003, p. 5, *available at* http://www.unhcr.org.uk/info/briefings/statistics/documents/numb2003.pdf (accessed February 20, 2004).

[5] *See* http://www.interaction.org/about/index.html (accessed February 20, 2004).

[6] *See generally* InterAction Member Activity Report: Colombia (May 2002) (Colombia Report); InterAction Member Activity Report: Afghanistan (May 2002) (Afghanistan Report); InterAction Member Activity Report: The Great Lakes (December 2003) (Great Lakes Report); InterAction Member Activity Report: West Africa (June 2003) (West Africa Report); InterAction Member Activity Report: Democratic Republic of the Congo (December 2000) (DRC Report); InterAction Member Activity Report: Sudan (April 2000) (Sudan Report); InterAction Member Activity Report: Indonesia (June 2003) (Indonesia Report); InterAction Member Activity Report: South Caucasus (December 2002) (South Caucasus Report); InterAction, Disaster Reponse – Efforts of Interaction Member Agencies in Chechnya and Ingushetia (September 2001) (Chechnya Report) (*reports available from* http://www.interaction.org/disaster/index.html or http://www.interaction.org/disaster/archive.html#Activity) (accessed February 20, 2004).

[7] Afghanistan Report, p. 6.

surrounding countries of Iran, Syria, Jordan, Lebanon, Turkey, and Saudi Arabia.[8] Thirty-two InterAction member organizations had active or planned operations in the West African nations of Sierra Leone, Liberia, Cote d'Ivoire, and Guinea.[9] In 2000, ten were active in Sudan.[10] Thirty-six member organizations were active in Kosovo and the surrounding areas in 2001.[11] In 1999, five had active operations in Somalia.[12]

Because humanitarian relief organizations are active in unstable areas, their presence often predates U.S. or U.S.-allied military intervention. For example, nine InterAction member organizations were active in Kosovo in 1998, prior to NATO intervention.[13] At least eight member organizations currently active in Afghanistan had operations there before the 2001 intervention by U.S.-led forces.[14] All eighteen member reports of active or planned

[8] InterAction Member Activity Report: Iraq, its Neighbors, and Lebanon (March 2003) (Iraq Report) p. 12, *available at* http://www.interaction.org/files.cgi/1148_Iraq_and_Neighbors_March_2003.pdf (accessed February 20, 2004).

[9] West Africa Report, p. 11.

[10] Sudan Report, p. 6.

[11] InterAction, Disaster Response – Efforts of Interaction Member Agencies in Kosovo (May 2001) (2001 Kosovo Report) available at http://www.interaction.org/kosovo/index.html (accessed February 20, 2004).

[12] InterAction Member Activity Report: Somalia (December 1999) (Somalia Report) p. 5, *available at* http://www.interaction.org/files.cgi/611_12-99Somalia.doc (accessed February 20, 2004).

[13] InterAction, Situation Report: Kosovo, A Guide to the Relief and Development Efforts of InterAction Member Agencies (April 1998) (1998 Kosovo Report) p. 3, *available at* http://www.interaction.org/files.cgi/606_04-98Kosovo.doc (accessed February 20, 2004).

[14] Afghanistan Report, p. 11 (Action Against Hunger USA), p. 20 (Catholic Relief Services), p. 25 (Church World Service), p. 36

(Continued on following page)

operations in Iraq in 2002 were given prior to the March 2003 U.S.-led invasion.

In order to carry out their missions with any degree of effectiveness, relief organizations must be on the ground in unstable, conflict-ridden areas. For example, Doctors Without Borders (Medicins Sans Frontieres) has delivered humanitarian aid throughout the world in armed conflicts for more than 30 years. Based on its experience, it has concluded that untargeted food drops, such as those carried out by the U.S. military at the start of its operations in Afghanistan, are rarely effective, and the key to successful delivery of services is on-the-ground intervention in the most dangerous "hotspots" around the world.[15]

Mention of only a few examples of the staffing of on-the-ground relief operations demonstrates their vast scope in troubled areas. According to recent figures on Afghanistan, CARE has 770 personnel present, 8 of them non-Afghan;[16] Action Against Hunger has 650 local staff in

(International Medical Corps), p. 38 (International Rescue Committee), p. 43 (Mercy Corps), p. 52 (Relief International), & p. 55 (Save the Children), *available at* http://www.interaction.org/files.cgi/468_Afghanistan_May_2002.pdf (accessed February 20, 2004). CARE USA has been working continuously in Afghanistan since the early 1990s. *See* Afghanistan, *at* http://www.careusa.org/careswork/countryprofiles/1.asp.

[15] Morten Rostrup, *'Humanitarian' and 'Military' don't go together,* INTERNATIONAL HERALD TRIBUNE, October 18, 2001, *available at* http://www.msf.org/content/page.cfm?articleid=F7813F57-F83B-4EA1-8BC921735D2878A0 (accessed February 20, 2004); *see also* Christopher Kremmer, *The Quality of Mercy: Food Drops in Minefields*, SYDNEY MORNING HERALD, October 10, 2001.

[16] *See* Afghanistan Special Report, *at* http://www.careusa.org/newsroom/specialreports/afghanistan/ (accessed February 20, 2004).

addition to its 34 international staff;[17] Catholic Relief Services operates three offices in Afghanistan;[18] and the International Rescue Committee operates five offices there.[19] In Iraq, Save the Children has 151 aid workers,[20] along with Mercy Corps's 30 international and 120 local staff in five offices[21] and the nearly 40 members of the International Medical Corps's staff.[22] Action Against Hunger has another 94 expatriate staff and about 1660 local staff in Sudan, Sierra Leone, Liberia, Guinea, the Democratic Republic of Congo, Angola, Somalia, Kosovo, Serbia, and Haiti.[23] Catholic Relief Services has another 932 relief workers operating in Sudan, Sierra Leone, Democratic Republic of Congo, Liberia, Guinea, Angola, Haiti, Kosovo, and Serbia, at least 19 of whom are international.[24]

Although their mission is different from that of aid workers, journalists, too, are regularly assigned to

[17] *See* Afghanistan Mission, *at* http://www.aah-usa.org/programs/afghanistan.html (accessed February 20, 2004).

[18] *See* Afghanistan, *at* http://www.catholicrelief.org/where_we_work/asia/afghanistan/index.cfm (accessed February 20, 2004).

[19] *See* The IRC in Afghanistan *at* http://www.theirc.org/Afghanistan/index.cfm (accessed February 20, 2004).

[20] *See* Iraq Crisis, *at* http://www.savethechildren.org/emergencies/iraq/index.asp (accessed February 20, 2004).

[21] *See* Iraq, *at* http://www.mercycorps.org/items/1398 (accessed February 20, 2004).

[22] *See* Iraq, *at* http://www.imcworldwide.org/programs/iraq.html (accessed February 20, 2004).

[23] *See* Where We Work, *at* http://www.aah-usa.org/programs/country_directory.html (accessed February 20, 2004).

[24] *See* http://www.catholicrelief.org/where_we_work/ (accessed February 20, 2004).

dangerous combat areas to carry out the vital mission of reporting on the military, political, and humanitarian consequences of armed conflicts in which U.S. troops are engaged.[25] With the advent of live television coverage and 24-hour news channels, the public – both in the United States and around the globe – has come to rely upon the news media and to expect that its members will report from locations at or near the front lines of combat zones.[26] Indeed, for journalists to effectively cover military conflicts, they must be "in the trenches" at or near combat zones. This often places reporters directly in harm's way as they pursue their stories.

Reflecting the vast scope of modern news reporting, it is estimated that several thousand members of the media were deployed before the coalition attack on Iraq began on March 20, 2003.[27] Over 600 correspondents were embedded

[25] Hans-Peter Gasser, *The protection of journalists in dangerous professional missions*, INTERNATIONAL REVIEW OF THE RED CROSS, February 29, 1983, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/BBE4FC40309D69C7C1256B66005C4EEE (accessed February 20, 2004).

[26] War coverage by a free press has long been recognized as vital to our democratic system. *See, e.g., McConnell v. FEC*, 124 S. Ct. 619, 722-23 (2003) (Scalia, J., concurring in part and dissenting in part) (noting the Founding generation's response to Britain's practice of taxing newspapers reporting unfavorable war coverage); *New York Times v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.").

[27] Tammy L. Miracle, *The Army and Embedded Media*, MILITARY REVIEW, Sept. 1, 2003.

with the U.S. military as the war proceeded.[28] Perhaps the best illustration of journalists' proximity to the front lines is the number of reporters who have been killed while carrying out their work. In 2001, eight journalists were killed in Afghanistan after hostilities began.[29] At least fourteen journalists have been killed while reporting on the recent Iraq conflict, four by coalition fire.[30]

B. The United States Government And The United Nations Have Recognized The Vitally Important Functions That Humanitarian Relief Organizations Serve In Areas Of Armed Conflict

Both the United Nations and the United States government have carved out a key role for private humanitarian organizations in their own relief planning. The United States Agency for International Development (USAID), the agency primarily responsible for foreign assistance, recognizes the importance of relief organizations in providing humanitarian and development assistance in developing countries, and considers them "leaders

[28] *Id.*; Ellen Goodman, *War Without the 'Hell,'* BOSTON GLOBE, April 17, 2003, p. A19.

[29] Sherry Ricchiardi, *Preparing for Battle*, AMERICAN JOURNALISM REVIEW, July 1, 2002, at 38, *available at* http://www.ajr.org/article.asp?id=2566 (accessed February 23, 2004); George Gedda, *Group: 37 journalists killed in 2001, group says*, MIAMI HERALD, March 26, 2002, at 25.

[30] *See* Committee to Protect Journalists, Journalists Killed in 2003: 36 confirmed, *at* http://www.cpj.org/killed/Ten_Year_Killed/2003_list.html (accessed February 20, 2004).

in disaster relief."[31] In 2002, U.S.-based private voluntary organizations (PVOs) registered with USAID spent nearly $8 billion on overseas assistance programs.[32] The lion's share of assistance from the State Department's Office of Foreign Disaster Assistance is provided through relief and rehabilitation projects managed by non-governmental organizations and PVOs.[33] When preparing for the aftermath of the 2003 invasion of Iraq, the U.S. government planned a significant role for humanitarian relief organizations in recognition of their expertise, resources, and responsiveness.[34]

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[31] USAID, 2004 report of voluntary agencies engaged in overseas relief and development registered with the U.S. Agency for International Development (VolAg Report) p. 4, *available at* http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/volag04.pdf (accessed February 20, 2004).

[32] VolAg Report p. 117. Private voluntary organizations registered with USAID are private, non-profit organizations providing voluntary charitable or development assistance abroad. VolAg Report p. 4 n. 1; USAID, Conditions for Registration for U.S. PVOs, *available at* http://www.usaid.gov/our_work/cross-cutting_programs/private_voluntary_cooperation/cond_reg.html (accessed February 20, 2004).

[33] USAID, Bureau for Democracy, Conflict, and Humanitarian Assistance, Office of Foreign Disaster Assistance, 2002 Annual Report pp. 16-17, *available at* http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2002.pdf (accessed February 20, 2004).

[34] *See* statements of Lt. Gen. (Ret.) Jay Garner, Coalition Provisional Authority, in testimony before the House Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003); Testimony of Richard L. Greene, Principal Deputy Assistant Secretary for Population, Refugees, and Migration, before the House Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003) (*testimony available from* http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=171) (accessed February 20, 2004); and Joseph J. Collins, Deputy Assistant

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The U.N. also recognizes the importance of relief organizations and relies upon them to assist the U.N.'s own relief efforts around the globe. The General Assembly has repeatedly recognized the role of non-governmental relief organizations,[35] and has called upon U.N. agencies to strengthen their relationships with those organizations.[36]

II. The Nature Of Humanitarian Relief Work And Journalism Present A Significant Risk Of Mistaken Military Detentions

Given the conditions in which relief workers and journalists are forced to operate, they face a real risk of mistaken or ill-founded military detention. The scenario for such detentions is made all the more realistic given the principles of independence and impartiality which govern

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Secretary of Defense, in testimony before the House Subcommittee on National Security, Emerging Threats and International Relations (July 18, 2003), *available at* http://reform.house.gov/UploadedFiles/CONGRESSIONAL%20TESTIMONY_Collins_18%20July03.pdf (accessed February 20, 2004).

[35] *See, e.g.*, Resolution Adopted by the General Assembly, Fiftieth Anniversary of the Office of the United Nations High Commissioner for Refugees and World Refugee Day, A/RES/55/76, para. 4 (Dec. 4, 2000), *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/563/95/PDF/N0056395.pdf?OpenElement (accessed February 20, 2004); Resolution Adopted by the General Assembly, International Conference on Central American Refugees, A/RES/45/141, para. 15 (Dec. 14, 1990), *available at* http://www.un.org/documents/ga/res/45/a45r141.htm (accessed February 20, 2004).

[36] *See, e.g.*, Resolution Adopted by the General Assembly, Office of the United Nations High Commissioner for Refugees, A/RES/54/146, para. 13 (Dec. 17, 1999), *available at* http://ods-dds-ny.un.org/doc/UNDOC/GEN/N00/294/94/PDF/N0029494.pdf?OpenElement (accessed February 20, 2004).

the activities of humanitarian workers, the practical necessity of forging ties with local communities, and the fog of war and unreliable communications between the military, relief organization, and journalists.

A. Impartiality, Independence, And Ties To Local Communities Enhance The Risk Of Mistaken Detention Of Relief Workers And Journalists

The principles of impartiality and independence in the provision of aid are universally-recognized tenets of the humanitarian mission.[37] Impartiality requires relief workers to provide aid to those in need, without regard to the personal or political characteristics of the aid recipients or whether the provision of aid is counter to U.S. political or military goals.[38] Similarly, independence dictates that relief workers cannot act to further governmental political or military agendas, or be perceived as instruments of foreign policy.[39]

[37] Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief, *in* The Project SPHERE Handbook, Oxfam, Oxford (2000), pp. 315-324 (Code of Conduct), *available at* http://www.sphereproject.org/handbook/hdbkpdf/hdbk_full.pdf (accessed February 20, 2004). The Code is followed by 281 signatories as of January 2004. *See* Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief: List of Signatories, *available at* http://www.ifrc.org/docs/pubs/disasters/codeconduct_signatories.pdf (accessed February 20, 2004). Principles 2, 3, and 4 are based on the principle of impartiality and independence.

[38] Code of Conduct, Principles 2 & 3.

[39] Code of Conduct, Principle 4.

Humanitarian workers adhere to the principles of impartiality and independence as indispensable requirements for the effective delivery of relief services. Further, both humanitarian workers and journalists must adhere to these principles for their own security in unstable areas. The principles recognize that if local communities perceive aid workers as associated with U.S. military or American political agendas, those communities may not offer the trust necessary for the effective delivery of assistance. As has been recently documented in Congressional hearings, military intervention into the delivery of humanitarian assistance impairs the perception of humanitarian groups as impartial actors and can give relief work the appearance of political or military acts.[40] Simply put, aid workers

[40] *See* testimony of Curtis Welling, AmeriCares, to the U.S. House Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform, Topic: Humanitarian Assistance Following Military Operations: Overcoming Barriers (May 13, 2003) (Welling Testimony); Congressional testimony of Kevin Henry, Advocacy Director, CARE USA, before the House Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003) (Henry Testimony); George C. Biddle, Statement for the Record, House Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations (May 13, 2003) (Biddle Statement) (*testimony available from* http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=171) (accessed February 20, 2004); testimony of Tammie Wilcutts, Save the Children, before the House Subcommittee on National Security, Emerging Threats and International Relations, Committee on Government Reform: "Humanitarian Assistance Following Military Operations: Overcoming Barriers – Part II" (July 18, 2003) (Willcuts Testimony); Statement of Serge Duss, Director of Public Policy and Advocacy, World Vision, On Humanitarian Assistance Following Military Operations: Overcoming Barriers – Part II before the Subcommittee on National Security, Emerging Threats and International Relations, U.S. House of Representatives (July 18, 2003) (Duss Statement) (*testimony available*

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can be denied access to the people they are trying to assist if their actions are viewed as partisan.[41]

Independence is critical not only for the effective delivery of relief services, but also to the safety of relief workers and journalists. NGOs that operated in Somalia and the Balkans are still paying the price, a decade later, for the confusion between military and humanitarian objectives created when U.S. troops were present among the refugee camps.[42] A common protest from humanitarian organizations operating in Afghanistan and Iraq is that U.S. efforts to associate military action with the provision of humanitarian aid creates a grave threat to the safety of relief workers.[43] Thus, humanitarian groups must take steps to insure they are independent of the U.S. military

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from http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=302) (accessed February 20, 2004).

[41] Morten Rostrup, *'Humanitarian' and 'Military' don't go together,* INTERNATIONAL HERALD TRIBUNE, October 18, 2001, *available at* http://www.msf.org/content/page.cfm?articleid=F7813F57-F83B-4EA1-8BC921735D2878A0 (accessed February 20, 2004).

[42] *Id.*; Nathan Ford, *Afghanistan – humanitarian aid and military intervention don't mix,* BRITISH JOURNAL OF GENERAL PRACTICE, November 2001, *available at* http://www.msf.org/countries/page.cfm?articleid=6A534F6C-233B-46AE-83BBEF2580A86AD4 (accessed February 20, 2004).

[43] Welling Testimony; Henry Testimony; Biddle Statement; Willcuts Testimony; Duss Statement; Congressional testimony of Patrick Carey, Senior Vice President/Program, CARE USA, before the Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations: Humanitarian Assistance Following Military Operations: Overcoming Barriers – Part II (July 18, 2003) (Carey Testimony), *available at* http://reform.house.gov/UploadedFiles/IRAQ%20CONGRESSIONAL%20TESTIMONY%20(July%202003).pdf (accessed February 20, 2004).

and that this independence is recognized by those they are trying to help.

As journalists and relief organizations are increasingly at risk of attack by combatants, strict adherence to the principles of impartiality and independence become ever more critical, heightening the risk that soldiers in combat zones will misperceive the independence of a relief worker or journalist as hostility. In response to heightened security risks, relief workers and journalists sometimes consider the use of private security forces, aggravating the risk of being misperceived as belligerents by U.S. forces.[44] Although the practice is debated in the relief community on both moral and security grounds,[45] armed guards are sometimes hired for protection in particularly dangerous situations, heightening the risk that journalists and aid

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[44] Charles Rogers, "The Changing Shape of Security for NGO Field Workers," Together Magazine (Jan.-March 1998), *available at* http://www.worldvision.org/worldvision/pr.nsf/stable/NGOsecurity (accessed February 20, 2004).

[45] The International Committee for the Red Cross, for example, has promulgated standards governing the decision to use armed security. *See* International Committee of the Red Cross, Council of Delegates, Resolution 9 "Armed Protection of Humanitarian Assistance" [Geneva, 1995] CRC, No. 310, Jan.-Feb. 1996, pp. 150-51, *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/FFFCE35F97695373C1256B6600597FCB (accessed February 20, 2004); Report on the Use of Armed Protection for Humanitarian Assistance (Extract from Working Paper Submitted Jointly by the International Federation and the ICRC at the Council of delegates, Geneva, 1-2 December 1995, 95/CD/12/1), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/209B1D50B7089A49C1256B66005A58D3 (accessed February 20, 2004). Some relief organizations, including CARE, discourage the practice under any circumstances.

workers may be mistaken for enemy supporters or misidentified as enemy combatants.[46]

Journalists, too, sometimes find it useful not to be distinguished from local populations. For instance, at the outset of the conflict in Afghanistan, journalists crowded into Tajikistan hoping to buy a $300 helicopter ride into the rebel-held sectors of northern Afghanistan. Some sneaked into Taliban territory dressed from head to toe like women in traditional burkhas.[47] In Afghanistan, one journalist disdained hiring an SUV driver, as is the typical custom, and preferred traveling with a low profile around the countryside in unmarked taxis. In doing so, the reporter gained some anonymity but risked raising suspicions if stopped by local warlords or U.S. troops.[48]

[46] Committee to Protect Journalists, On Assignment: Covering Conflicts Safely, *at* http://www.cpj.org/Briefings/2003/safety/safety.html (accessed February 16, 2004); Phillipe Dind, Security in ICRC field operations in "Secure 02" (June 2002), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/FFF830A9E30C059AC1256B66005C0B1C (accessed February 20, 2004).

[47] Neil Hickey, *The Pentagon's War Reporting Rules are the Toughest Ever,* COLUMBIA JOURNALISM REVIEW, Issue 1: January/February 2002, *available at* http://www.cjr.org/issues/2002/1/afghan-hickey.asp (accessed February 20, 2004).

[48] Committee to Protect Journalists, On Assignment: A Guide to Reporting in Dangerous Situations, *at* http://www.cpj.org/Briefings/2003/ safety/journo_safe_guide.pdf (accessed February 20, 2004).

B. The Fog of War and Poor Communications Between the Military, Relief Organizations and Journalists Heighten The Risk Of Mistaken Identification Of Aid Workers And Journalists As Enemy Combatants

Under the circumstances in which relief organizations and journalists work, it is all too easy for the military to mistake a neutral party for an enemy. Such errors can occur in the fog of war, and the conditions that give rise to them are exacerbated by poor communication between the military, on one hand, and journalists and relief workers, on the other. Even when journalists and relief workers follow the military into an area of conflict in coordination with military planners, communication often breaks down.[49] Communication is less reliable when relief workers and journalists are present before military operations commence or when they act independently of military planners. Furthermore, confusion and poor coordination may prevent a relief or news organization from discovering that field personnel have been mistakenly detained.

Several fatal incidents in Iraq demonstrate the difficult military judgments military forces must make in the heat of battle. On August 17, 2003, U.S. forces operating near Baghdad shot and killed a Reuters television cameraman, Mazen Dana. According to the military, a soldier mistook Dana's camera for a rocket-propelled grenade.[50] After an investigation, the military concluded

[49] *See* Welling Testimony; Henry Testimony; Carey Testimony.

[50] Joel Campagna, *A U.S. Silence in Iraq Puts a Deadly Cloud Over Journalists,* L.A. TIMES, Aug. 27, 2003, p. B13, *available at* http://www.cpj.org/op_ed/Campagna27aug03.html (accessed February 20, 2004);

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the soldiers acted within the rules of engagement.[51] In a similarly unfortunate episode, two Reuters cameramen were killed in Iraq when U.S. troops fired upon the hotel where they were staying. The military claimed the troops were fired upon from the Palestine Hotel before they returned fire. Some reports said that the troops fired on the hotel when they saw a person with binoculars in a hotel window, leading the military to believe the individual was serving as an artillery spotter for Iraqi fighters.[52]

If it is hard to tell a camera from a grenade launcher, it is easy to imagine the difficulties military officials face trying to distinguish between true enemy combatants and those individuals who are simply in war zones performing their jobs. As demonstrated by numerous examples, over the last two years the U.S. military has frequently mistaken neutral parties for enemy combatants and detained them for various periods.

In January 2004, the U.S. military arrested three journalists outside of Baghdad. Two worked for Reuters and one for NBC. The journalists were detained for three days, and were allegedly treated poorly and deprived of sleep before being released,[53] The military claimed it had

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Mona Eltahawy, *A Needless Death in the Light of Day,* WASHINGTON POST, Aug. 23, 2003, p. A23.

[51] AP, *Military: Shooters Followed the Rules,* FT. LAUDERDALE SUN-SENTINEL, Sept. 23, 2003, p. 10A.

[52] Joel Campagna and Rhonda Roumani, *Permission to Fire: CPJ Investigates the Attack on the Palestine Hotel,* May 27, 2003, *at* http://www.cpj.org/Briefings/2003/palestine_hotel/palestine_hotel.html (accessed February 20, 2004).

[53] *See* Luke Harding, *US military 'brutalised' journalists,* THE GUARDIAN, Jan. 13, 2004, *available at* http://www.guardian.co.uk/

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detained "enemy personnel posing as media," guerillas who wore bulletproof jackets marked "press" and fired on U.S. forces. International media organizations have called on the Pentagon to publicly acknowledge that the Reuters and NBC journalists detained were not "enemy personnel posing as media."[54]

In July 2003, U.S. forces in Iraq detained Said Abu Taleb and Soheil Kareemi, two journalists with Iranian State Television, after they were seen filming near a U.S. military outpost. A coalition spokesman was quoted as saying that the journalists were detained for committing security violations and that they were "not acting in a journalistic capacity when they were arrested." They were released without charges some four months later, in November, and allowed to return to Iran.[55]

Even more troubling is the case of Sami al-Haj, a Sudanese cameraman working for the pan-Arab television station, al-Jazeera. On December 15, 2001, al-Haj was arrested by Pakistani police on the Pakistan-Afghanistan border. He had worked at the station since October 2001

Iraq/Story/0,2763,1121981,00.html (accessed February 20, 2004); Letter from Ann Cooper, Executive Director, Committee to Protect Journalists, to Lt. Gen. Ricardo S. Sanchez, Commander, Coalition Joint Task Force 7 (January 21, 2004), *available at* http://www.cpj.org/protests/04ltrs/Iraq21jan04pl.html (accessed February 20, 2004).

[54] Ann Cooper, *Journalists in Iraq: from 'embeds' to targets,* SEATTLE TIMES, February 9, 2004, *available at* http://www.cpj.org/op_ed/Cooper09feb04.html (accessed February 20, 2004).

[55] Agence France-Presse, *Two Iranian state TV journalists briefly held after Baghdad bombing,* January 19, 2004, *available at* http://www.smh.com.au/articles/2004/01/18/1074360639457.html (accessed February 20, 2004).

and had been sent to Pakistan to cover the U.S. military operation in Afghanistan. Following his arrest, al-Jazeera had no news of him until April 2002, when al-Haj's wife received a letter through the International Red Cross saying he was being held at the U.S. Naval base at Guantanamo Bay. The station has been unable to find out why he is being held or whether he has been charged.[56]

III. Due Process and the Geneva Convention Provide Mechanisms to Avoid Indefinite Mistaken Detentions

In light of the serious risk of mistaken military detention facing journalists and humanitarian relief workers, military detainees should be afforded some form of meaningful due process to test the accuracy of their classification as enemy combatants. Meaningful due process review would help ensure that mistakes are rectified, allow *amici* and their members to discharge their responsibilities free from the chilling effect that is created by the Fourth Circuit's rule, and potentially deter the military from arbitrary or groundless detentions. *Amici* recognize that the requirements of due process vary depending on the context, *see Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), and in this case *amici* take no position as to the specific procedural protections that

[56] *See* Freelance Reporters: United States – 2003 Annual Report, *at* http://www.rsf.fr/article.php3?id_article=6228 (accessed February 20, 2004); Letter from Ann Cooper, Executive Director, Committee to Protect Journalists, to The Honorable Donald H. Rumsfeld, Secretary of Defense (September 27, 2002), *available at* http://www.cpj.org/inquiry/2002/USA27sept02inq.html (accessed February 20, 2004).

should be afforded to Petitioner either through the civil courts or under the Geneva Convention. But under the Fourth Circuit panel's approach, Petitioner was afforded no real process at all, based solely on the panel's inference that he was captured in a zone of combat. That criterion applies equally to thousands of journalists and relief workers, and is far from being sufficiently probative of anyone's status as a belligerent to justify indefinite, unreviewable detention by the Executive Branch.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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